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NO. 22-CI-005189

JEFFERSON CIRCUIT COURT
DIVISION ELEVEN (11)
JUDGE BRIAN C. EDWARDS

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LISA SOBEL, ET AL.

PLAINTIFFS

OPINION AND ORDER

RUSSELL COLEMAN, ET AL.

DEFENDANTS

This matter comes before the Court on Plaintiff Jessica Kalb’s Motion for Summary Judgment.¹ Defendants Russell Coleman, et al. (Coleman) subsequently filed a Combined Response to Plaintiffs’ Motion and Cross-Motion for Summary Judgment; Plaintiffs then filed a Reply and Response; with Defendants then filing a Reply. After a careful review of the pleadings and relevant case law, the Court will partially deny and partially grant Plaintiff’s Motion for Summary Judgment and partially grant and partially deny Defendants’ Cross-Motion for Summary Judgment.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

Plaintiff Jessica Kalb is a Jewish woman who lives in Louisville, Kentucky. Plaintiff Kalb has previously faced infertility challenges but was able to become pregnant through IVF. She currently has a two-year old daughter (at the time of the filing of this action) and would like for her daughter to have a sibling; however, she is uncertain if this can be done safely and legally under Kentucky law. Kalb is currently paying fees for storage of nine (9) embryos that were created during the previous IVF process. She was scheduled to transfer a second embryo in August 2022 but decided to cancel due to the overturning of *Roe v. Wade* and her concerns over

¹ Plaintiff Kalb was previously joined by two additional Plaintiffs whose claims were dismissed due to a lack of standing.

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her rights under Kentucky’s abortion laws. Ms. Kalb asserts that in attempting to interpret *KRS 311.772* titled the Human Life Protection Act (HLP) alongside other related statutes, she is

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unclear about her rights and obligations and fears that in order to avoid criminal prosecution, she could be forced to carry a non-viable fetus to term and/or to jeopardize her own health. Ms. Kalb is also concerned about what to do with the nine (9) embryos currently being stored and she worries about being prosecuted for capital homicide if she chooses to discard these embryos. Accordingly, Ms. Kalb seeks a Judgment declaring that the HLP is void for vagueness and unintelligibility.

Ms. Kalb’s complaint also raises religious based constitutional challenges to the aforementioned Kentucky statutes. Ms. Kalb argues that she would like to expand her family and that this desire is rooted in her religious faith. In Judaism, having children is considered a blessing, and the commandment *to be fruitful and multiply* is paramount. Ms. Kalb avers that Kentucky’s abortion laws pose significant challenges to her ability to follow her religiously mandated requirement to be fruitful and multiply because she is unable to participate in IVF processes without risking being criminally prosecuted. Thus, Plaintiffs brought this case in October 2022 alleging that

- 1) **Kentucky statutes relating to abortion under *KRS 311.772* are unconstitutionally vague and unintelligible, and**
- 2) **Kentucky statues relating to abortion under *KRS 311.772* violate the Kentucky Religious Freedom Restoration Act (RFRA) by being sectarian Christian in nature and thereby violate Plaintiff’s rights under that Act as well as Section 5 of the Kentucky Constitution.**

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Plaintiff now seeks summary judgment and the awarding of a Declaratory Judgment on all of her claims. Attorney General Coleman objects to the Plaintiff's Motion for Summary Judgment arguing that Plaintiff cannot succeed on the merits of her claims and seeks summary judgment dismissing Plaintiff's claims.

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STANDARD

The applicable legal standard for the awarding of summary judgment is whether there are “no genuine issues as to any material fact and that the moving party [is thus] entitled to judgment as a matter of law”. *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. Ct. App. 1996). “The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present” evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. Ct. App. 2001). The party that opposes a summary judgment motion “cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial.” *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

OPINION

In the matter before this Court, Plaintiff is asking the Court to award her summary judgment and to grant her request for a Declaratory Judgment. Kentucky's Declaratory Judgment Act, *KRS 418.040*, states that “In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights...and the court may make a binding declaration of rights.” The purpose of a declaratory judgment is to allow “the parties to

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have their rights and obligations declared without being forced to act improperly and initiate litigation after an injury has occurred.” *Jarvis v. National City*, 410 S.W.3d 148, 153 (Ky. 2013).

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I. Whether KRS 311.720 and KRS 311.772 are unconstitutionally vague and unintelligible.

(COUNTS I, II)

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215 (2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This “returned the issue of abortion to the people’s elected representatives.” *Dobbs*, 597 U.S. 215. As a result, Kentucky’s legislature passed into law (over gubernatorial veto) *KRS 311.772*, the Human Life Protection Act (HPLA). Under the HPLA, conduct “to” or “upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being” is prohibited. *KRS 311.772(3)(a)*. The HPLA does allow “a licensed physician to perform a medical procedure necessary in [his or her] reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.” *KRS 311.772(4)(a)*.

Plaintiff asserts that because certain provisions of the HPLA are contradictory to other Kentucky laws regarding abortion, this leads to a situation in which it is impossible for ordinary people to understand what conduct is legally prohibited thus rendering the HPLA vague and unintelligible. Plaintiff specifically raises concerns about how this situation will impact those participating in IVF (In Vitro Fertilization) processes due to uncertainty about the consequences surrounding the handling of unused embryos. Plaintiff points to different statutes defining when

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a human life begins which range from the moment of detection of a fetal heartbeat to fifteen (15) weeks post conception.

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Plaintiff also raises concerns about the lack of exceptions under the law, namely regarding complications during pregnancy, and lethal fetal anomalies and argues that these concerns impinge upon her willingness to follow her religious decrees to reproduce and expand her family in a manner that does not jeopardize her health or the health of her unborn children.

The statute that Plaintiff is asking to be declared unconstitutional is *KRS 311.772*, which became law in Kentucky immediately following the U.S. Supreme Court's 2019 decision to overturn *Roe v. Wade* in the case *Dobbs v. Jackson Women's Health Organization*, 597 U.S 215 (2022), reviewing *Jackson Women's Health Organization v. Dobbs*, 945 F.3d 265, 274 (5th Cir. 2019).

KRS 311.772 makes it a Class D Felony to assist a pregnant woman through conduct resulting in "the termination of the life of an unborn **human being**". *KRS 311.772 (3)(b)*.

No person may knowingly....administer to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being; or 2. Use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being. *KRS 311.772 (3)(a)*.

The statute defines "an unborn **human being**" as:

"an individual living member of the species homo sapiens throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth." *KRS 311.772(1)(c)*.

The statute articulates exceptions which exempt individuals from being subjected to criminal prosecution for conduct resulting in the termination of the life of an **unborn human being** if such conduct is deemed:

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“necessary in reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.” KRS 322.772(4)(a).

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However, the statute is silent as to whether an individual involved in IVF processes who chooses to discard unused fertilized embryos/ova that were created for IVF purposes would be exempted from criminal prosecution.

Plaintiff acknowledges that *KRS 311.772* is, in sum, designed to subject a medical provider to criminal liability for assisting a **“pregnant woman”** in conduct resulting in the termination of life of unborn human beings. However, Plaintiff expresses concern about the lack of an articulated exception for IVF as well as concern that if the HPLA’s definition for an unborn human being is also applied to Kentucky’s homicide statutes, it would then be immaterial whether or not she was pregnant and she could then be subject to criminal prosecution for homicide if she chooses to destroy her unused ova. *KRS 311.772(1)(c)*.

Kentucky’s General Homicide statute, *KRS 507*, prohibits the intentional, wanton, or reckless taking of the life of another **“human”** or **“person”**. The statute articulates no definition of what constitutes a **“human”** or **“person”**.

Kentucky’s Fetal Homicide statute, *KRS 507A*, prohibits the deprivation of the life of an **“unborn child”** and defines an **unborn child** as:

a member of the species homo sapiens in utero from conception onward, without regard to age, health, or condition of dependency. *KRS 507A.010 (1)(c)*.

However, unlike the HPLA, Kentucky’s Fetal Homicide Statute expressly exempts from prosecution those participating in IVF related activities by exempting from prosecution any individual acting:

As part of or incident to diagnostic testing or therapeutic medical or fertility treatment, provided that the acts were performed with that degree of care and skill which an ordinarily careful, skilled, and prudent health care provider or a person

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acting under the provider's direction would exercise under the same or similar circumstances. KRS 507A.010(2)(b).

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Thus, although it appears clear that an individual involved in the destroying of embryos/ova cannot be prosecuted under the HPLA or under Kentucky's Fetal Homicide statutes, it is unclear whether under Kentucky's General Homicide statutes, this individual could be prosecuted for conduct leading to the deprivation of the life of a human as defined under *KRS 311.772(1)(c)*. More succinctly, Plaintiffs like Ms. Kalb cannot be assured that a prosecutor will not use the HPLA's definition of "human being" for a General Homicide prosecution under *KRS 507* of an individual who participates in the destruction of unused ova created for IVF purposes.

Respondents have tacitly acknowledged the legitimacy of this concern, however; respondents rely upon a 2004 Kentucky Supreme Court decision which held

"the definition of "human being" set forth in *KRS 311.720* cannot constitutionally be applied to the homicide provisions of the penal code." *Commonwealth v. Morris*, 142 S.W.3d 654 (Ky. 2004).

The decision of the *Morris* Court discussed procedural issues of when a definition from one statute can be applied to another statute. However, a careful review of the *Morris* decision shows that it was substantively rooted within a legal analysis of the doctrine of "viability" contained within the then prevailing precedent, *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, the Supreme Court found that before viability, States could not enforce restrictions on abortion. In reliance upon *Roe*, the Court in *Morris* reached the logical conclusion that notwithstanding statutory authority to the contrary, an individual could not be subjected to criminal liability for conduct against a "human being" unless that "human being" was viable and had the capability of meaningful life outside the mother's womb. The United States Supreme Court's opinion in *Dobbs* effectively allowed states to come up with their own definitions of "human being"

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without deference to the doctrine of viability. With the United States Supreme Court's 2019 reversal of *Roe v Wade*, this Court must agree with Ms. Kalb's contention that the holding in *Morris* cannot be used as armor to shield against a deeper examination of her claims in this matter.

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Kentucky is one of many states in our nation grappling with questions of reconciling post *Dobbs* abortion restrictions with accessibility to IVF processes. However, whereas other states have addressed this legitimate concern through legislative action, our Commonwealth has attempted to address this concern merely through the procurement of non-binding Attorney General Opinions. Alabama is a notable example of a State that has gone beyond a non-binding advisory Attorney General opinion to address this question. Following a decision by the Alabama Supreme Court in which a nearly identical definition of "human being" was applied to allow a civil wrongful death action to proceed against individuals involved in the destruction of embryos created for IVF purposes, the Governor of Alabama signed into law legislation intended to specifically protect IVF access. *Alabama SB 159*. Specifically, this law exempts individuals participating in IVF processes from both civil liability **and criminal prosecution**.

The void-for-vagueness doctrine requires that a statute define with specificity its scope and articulate what individuals can or cannot do with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Commonwealth v. Kerr*, 136 S.W. 3d 783 (Ky. Ct. App. 2004). That is exactly this Court's concern here. *KRS 311.720* is titled **Definitions for KRS 311.710 to 311.820 and other laws**. *KRS 311.720* defines Human being as "any member of the species homo sapiens from fertilization until death". The question this Court is presented with is whether Ms. Kalb and similarly situated individuals can be expected to understand with

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sufficient definiteness that they will never be subjected to a criminal prosecution for their involvement in IVF processes for conduct which under the plain language of *KRS 311.720*, could be considered the intentional taking of the life of a human being.

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As reflected in the previously discussed Attorney General's non-binding advisory opinion, a prosecutor today may read the statute as clearly providing no such avenue for the prosecution of Ms. Kalb for her involvement in IVF processes. However, Ms. Kalb and others seeking to expand their families through IVF procedures have no binding assurance against the possibility that a prosecutor tomorrow interprets the statute differently and uses it as the basis for a prosecution.

The appropriate way that these very legitimate concerns must be addressed is through expressed legislative consideration of whether participation in IVF procedures is exempted or is not exempted conduct under the HLP. Until that time, Plaintiffs such as Ms. Kalb, who seek to expand their families through IVF, must do so at the risk of being criminally prosecuted for homicide by a prosecutor who shares a different legal opinion than that of the respondent in this action or his predecessor.

In this Court's prior opinion concerning this controversy, the Court as a matter of dicta wrote "... Plaintiffs' claims relating to concerns about being criminally prosecuted for participation in in IVF processes are misplaced. The Court notes the conclusions articulated in the Attorney General's October 26, 2022, Advisory Opinion stating that the HLP "does not apply to the use, care, or disposition of embryos fertilized by in vitro fertilization." However, since that time, much has changed.

In January of 2026, a woman in Wolfe County, Kentucky was arrested, held on a \$100,000 full cash bond, and indicted by a Wolfe County Grand Jury on various charges

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including Fetal Homicide for allegedly taking medication for the purpose of aborting her unborn child. Following her arrest and indictment, these charges were ultimately dismissed.

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Since the start of Kentucky’s 2026 legislative session, bills have been introduced that would open the door for homicide charges to be prosecuted in the death of an unborn child. *HB 714*. Accordingly, notwithstanding the current Attorney General’s assurances, because of the myriad of definitions regarding the definition of “human being” and under what circumstances an individual can be held civilly liable or criminally culpable for terminating the life of a “human being”, this Court can no longer dismiss the concerns raised by Plaintiff Kalb regarding how she and others should interpret what they can and cannot lawfully do in order to avoid possible incarceration and criminal prosecution. This conundrum can and should be resolved; however, the power to resolve rests not with this Court but with the Kentucky State Legislature. As discussed above, legislative bodies in sister states such as Alabama have done so, and it is time for Kentucky’s legislative body to also do so.

Further, the Court would like to point out that in addition to the concerns regarding the applicability of *KRS 311.720*’s definition of human being to the homicide statute, the Court has other concerns regarding the general unintelligibility and vagueness concerns presented by the *KRS 311.720* definitions.

KRS 311.720 is titled Definitions for *KRS 311.710* to *311.820*; within those definitions are separate definitions for human being, fetus, and unborn child. Each of these definitions is different. Because these conflicting and intertwined definitions are intended to apply to specific statutes, each of these statutes must be deemed void for vagueness and unintelligibility as to their scope.

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Accordingly, the Court GRANTS Plaintiff’s Motion for Summary Judgment on Counts I and II of her claims seeking a declaration that *KRS 311.720* and *KRS 311.772* are unconstitutionally void for vagueness specifically as they relate to the applicability and scope of their definition of “human being”.

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II. Whether the HPLA (KRS 311.772) violates the Kentucky Religious Freedom Restoration Act (RFRA) (COUNTS III, IV, V)

The Court will now address Plaintiff’s claim that the HPLA unconstitutionally infringes upon her Religious Freedom as codified by *KRS 446.350* (Religious Freedom Restoration Act “RFRA”). As discussed above, Plaintiff is a Jewish woman seeking to expand her family through IVF procedures. Plaintiff argues that the first commandment of her Jewish faith instructs her to “be fruitful and multiply”. Plaintiff wishes to honor this commandment through the use of IVF. Plaintiff argues that the HPLA, which currently provides no specific exemption for IVF and which defines human life as beginning at the moment of conception, places an unconstitutional burden upon her ability to honor her religious commandments through IVF processes.

Plaintiff further argues that Kentucky’s Abortion laws disregard beliefs rooted in non-Christian faith pointing specifically to the similarity in the language contained in the Kentucky Abortion statues definition of human being and the language contained in a 2024 Southern Baptist Convention resolution.

KRS 446.350 (Religious Freedom Restoration Act “RFRA”) reads in relevant part:

Government shall not substantially burden a person's freedom of religion. The right to act or refuse to act in a manner motivated by a sincerely held religious belief may not be substantially burdened unless the government proves by clear and convincing evidence that it has a compelling governmental interest in infringing the specific act or refusal to act and has used the least restrictive means to further that interest. A “burden” shall include indirect burdens such as

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withholding benefits, assessing penalties, or an exclusion from programs or access to facilities.

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Kentucky's RFRA along with similar laws in other states is Constitutionally rooted in the Free Exercise and the Establishment Clauses of the United States Constitution's First Amendment. *Missionaries of St. John the Baptist v. Frederick*, 727 S.W.3d 400 (Ky. 2025). The purpose of the First Amendment's Establishment Clause is to prohibit government endorsement of religion. The purpose of the First Amendment's Free Exercise Clause is to protect individuals from being deprived of their right to believe and practice their faith according to their conscience.

As stated above, Plaintiff is a woman of Jewish faith and to *be fruitful and multiply* is the first commandment in the Torah, the foundational text of Judaism. *Be fruitful and multiply* is also a foundational principle for Christians as articulated in Genesis 1:28 and often referred to as the "creation mandate". Similar commandments or mandates are present in the holy texts of other religions including Islam and Hindu.

In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court stated that

Law that is neutral and of general applicability need not be justified by compelling government interest even if law has incidental effect of burdening particular religious practice.

In carefully reviewing the arguments proffered by Plaintiff alleging that the HLPAs violates the Establishment Clause of the Constitution by showing preference to Christian doctrines, the Court finds this argument to be without merit.

The Court will now address Plaintiff's Free Exercise of religion arguments. For many of the same reasons discussed above, Plaintiff's claim that her desire to participate in IVF processes is substantially burdened because of her religious beliefs is problematic. The specific religious

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commandment Plaintiff seeks to honor through participating in IVF processes is a general commandment present within the world's most widely practiced religions. As is reflected above, the Court appreciates Plaintiff's concerns regarding engaging in IVF processes. However, the Court does not believe that the HLPAs unconstitutionally burden Ms. Kalb from exercising her religious beliefs any more than it burdens followers of Christianity, Islam or Hindu from exercising their religious beliefs. Thus, any burden created by the HLPAs is a religiously neutral, general burden upon virtually any Kentuckian of faith seeking to participate in IVF. The United States Supreme Court has effectively held that a government act that places a neutral and generally applicable burden upon individuals of differing religious beliefs is constitutionally permissible. *Mahmoud v. Taylor*, 606 U.S. 522 (2025). Therefore, because this Court does not believe that the HLPAs substantially burden Plaintiff *due to her religious beliefs*, a strict scrutiny-based analysis is unnecessary. (emphasis added).

Accordingly, the Court must conclude that Plaintiff has not demonstrated that her rights under the RFRA have been violated and that Defendant's Cross-Motion for Summary Judgment on Counts III, IV, and V of Plaintiff's Complaint must be granted.

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ORDER

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WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART, and Defendants' Cross-Motion for Summary Judgment is DENIED IN PART AND GRANTED IN PART.



BRIAN C. EDWARDS, JUDGE
JEFFERSON CIRCUIT COURT

cc:

Attorneys of Record

*THERE BEING NO JUST CAUSE FOR DELAY
THIS IS A FINAL AND APPEALABLE OPINION*